

**Montgomery Ward & Company, Inc. and United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO, Local 746.** Case 16-CA-8581

October 8, 1982

### DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND  
MEMBERS FANNING, JENKINS, AND  
ZIMMERMAN

On October 28, 1980, Administrative Law Judge Clifford H. Anderson issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Decision.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge, as modified herein, and to adopt his recommended Order.

We agree that the Administrative Law Judge properly balanced the conflicting statutory and property rights involved herein and that the Union, through striking employees of Buddy Schoellkopf, with whom the Union was engaged in a primary dispute, had a protected Section 7 right to engage in consumer boycott handbilling of Buddy's products on Respondent's premises in the absence of effective alternative means of reaching the public. *Seattle-First National Bank*, 243 NLRB 898 (1979); *Hudgens v. N.L.R.B.*, 424 U.S. 507 (1976). The Union had a right to handbill consumers on Respondent's property, and to do so effectively, while simultaneously accommodating and disturbing as little as possible Respondent's private property rights. *Seattle-First National Bank*, *supra*. Thus, Respondent's restrictions requiring that the Union handbill from the curb, driveway entrances, or anywhere else not on its property substantially diluted and restricted that Section 7 right, since, like picketing, the effectiveness of handbilling depends on its location. *United Steelworkers of America, AFL-CIO, et al. [Carrier Corp.] v. N.L.R.B.*, 376 U.S. 492 (1964). We therefore agree with the Administrative Law Judge's finding that by not permitting the handbilling to take place on its premises Respondent interfered with that Section 7 right in violation of Section 8(a)(1) of the Act. *N.L.R.B. v. Fruit & Vegetable Packers & Warehousemen, Local 760, et al. (Tree Fruits, Inc.)*, 377 U.S. 58 (1964); compare *Giant Food Markets, Inc.*, 241 NLRB 727 (1979), enforcement denied 633 F.2d 18 (6th Cir. 1980). However, in reaching these conclusions, we find it unnecessary to consider, and we do not

adopt, the Administrative Law Judge's extensive analysis and his resultant findings that consumer-directed boycott picketing, area standards picketing, organizational activity, and primary economic activity are Section 7 rights of equal nature and strength. We also find it unnecessary to consider his rationale and conclusions concerning the relationship and impact of Section 8(b)(4) and Section 7 relative to these activities.

### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Montgomery Ward & Company, Inc., Tyler, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

CHAIRMAN VAN DE WATER, concurring:

I agree that Respondent violated Section 8(a)(1) of the Act by demanding the removal of certain nonemployees engaged in handbilling on its property. However, I must note my colleagues' failure to consider the impact of the nature of the Section 7 activity involved herein in applying the balancing test of *Babcock & Wilcox*.<sup>1</sup>

In his Decision, the Administrative Law Judge engages in an extensive analysis of the application of *Babcock & Wilcox* to "struck product" handbilling which, as far as I am aware, is an issue never before considered by the Board. Yet my colleagues merely find it unnecessary to consider the Administrative Law Judge's finding that consumer handbilling is a Section 7 right of "equal nature and strength" with area standards picketing, organizational activity, and primary economic activity. Rather, they merely apply the "lack of alternative means of communication" standard of *Babcock & Wilcox*, *Hudgens v. N.L.R.B.*,<sup>2</sup> and *Giant Food Markets, Inc.*,<sup>3</sup> to a distinctly different form of Section 7 activity.

Nevertheless, I agree with the result reached by my colleagues for several reasons. First, I believe, contrary to the Administrative Law Judge and my colleagues, that the rule enunciated in *N.L.R.B. v. Fruit & Vegetable Packers & Warehousemen, Local 760, et al. [Tree Fruits, Inc.]*,<sup>4</sup> a case involving consumer picketing, need not enter into this case, since the conduct engaged in by the Union was not

<sup>1</sup> *N.L.R.B. v. Babcock & Wilcox Co.*, 351 NLRB 105 (1965).

<sup>2</sup> 424 U.S. 507 (1976).

<sup>3</sup> 241 NLRB 727 (1979), enforcement denied 633 F.2d 18 (6th Cir. 1980).

<sup>4</sup> 377 U.S. 58 (1964).

shown to constitute picketing.<sup>5</sup> Rather, it consisted merely of consumer handbilling in support of a primary labor dispute, conduct specifically approved by Congress in the publicity proviso to Section 8(b)(4) of the Act.<sup>6</sup> Second, since handbilling does not involve groups of individuals "patrolling" in front of the employer's establishment, such conduct is not nearly as intrusive and disruptive of a business as picketing. Thus, this Section 7 right can, in many circumstances, be exercised with very little disturbance of private property rights, especially when, as here, it is conducted in areas customarily open to the general public.<sup>7</sup>

Finally, the alternatives available to the Union were virtually nonexistent. In this regard, I note that, since the Union's conduct involved passing out handbills rather than utilization of picket signs, to restrict the Union to conveying its message from parking lot entrances would render the handbilling wholly ineffective. Unlike the picketing situation, where potential customers might gain information from picket signs as they drove by the pickets, here only those customers willing and able to stop their car, open their window, and receive a handbill would receive the Union's message. Not surprisingly, the record reveals that very few customers did stop and those who did created a traffic hazard. Utilization of parking lot entrances in handbilling cases such as this is even less effective than it might be in the picketing context.

With respect to other alternatives the Administrative Law Judge found, and I agree, that use of the various mass media was not a reasonable alternative means of communication. Thus, the Union here lacked any alternative method of reaching individuals who might purchase items produced by

Buddy Schoellkopf Products, Inc., with whom it had a labor dispute.

In sum, the only viable means by which the employees could exercise their Section 7 right to communicate with potential purchasers of their employer's product was to engage in activity on Respondent's premises. Since the area utilized was open to the general public and resulted in a minimal, nondisruptive intrusion on Respondent's property, the balance in this case must be struck in favor of the employees' Section 7 rights to engage in consumer handbilling in support of a primary labor dispute. Accordingly, I agree with my colleagues that Respondent violated Section 8(a)(1) of the Act by demanding the removal of the employees so engaged.

## DECISION

### STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge: This case was heard before me in Tyler, Texas, on June 17, 1980, pursuant to a complaint and notice of hearing issued on February 1, 1980, by the Regional Director for Region 16 of the National Labor Relations Board based upon a charge filed on July 5, 1979, by United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO, Local 746 (herein the Charging Party or the Union), against Montgomery Ward & Company, Inc. (herein Respondent).

The complaint alleges that Respondent demanded that employee-agents of the Union cease certain handbilling on Respondent's premises in violation of Section 8(a)(1) of the National Labor Relations Act (herein the Act).

All parties were given full opportunity to participate in the hearing, to examine and cross-examine witnesses, to introduce relevant evidence, to argue orally, and to file briefs.

Upon the entire record herein, including helpful briefs from all parties, and from my observation of the witnesses and their demeanor, I make the following:

### FINDINGS OF FACT<sup>1</sup>

#### I. JURISDICTION

Respondent is an Illinois corporation engaged in the retail sale of merchandise through retail department stores, including a store located in Tyler, Texas (herein the store). During the 12 months immediately preceding the issuance of the complaint and in the course of its business operations, Respondent enjoyed a gross volume of business in excess of \$500,000 and caused goods valued in excess of \$50,000 to be shipped to its store from outside the State of Texas.

<sup>1</sup> The facts were essentially not in dispute. Except where noted the facts are based on the pleadings, the stipulations of the parties, and the unchallenged testimony of credible witnesses.

<sup>5</sup> See, e.g., *Teamsters Local Union No. 688, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Levitz Furniture Company of Missouri, Inc.)*, 205 NLRB 1131, 1133 (1973).

<sup>6</sup> Sec. 8(b)(4)(ii)(B) states that it is an unfair labor practice for a labor organization to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, with an object of

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . .

. . . . .

*Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer . . . .

<sup>7</sup> That Respondent itself did not consider overly intrusive solicitation similar to that of the Union here is evidenced by the fact that in the past it has permitted charitable organizations to solicit contributions in precisely the same areas where it objected to the Union's handbilling.

## II. LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

## III. THE ALLEGED UNFAIR LABOR PRACTICES

### A. The Issue

The issue is whether or not, in the circumstances present here, an employer violates the Act when it demands employees of a separate employer cease handbilling activities on its property designed to cause the employer's customers not to purchase items manufactured by a separate employer with whom the handbilling employees have an economic dispute.

### B. Events and Circumstances

#### 1. Background

The Union has had at all relevant times from 1,100 to 1,250 members. It has had a contract with but a single employer. In September 1978 the Union was certified by the Board as representative of certain employees of Buddy Schoellkopf Products, Inc., at its facility located in Tyler, Texas (herein Buddy). In February 1979<sup>2</sup> the Union commenced an economic strike against Buddy which continued through the relevant dates involved herein. The strike was attended by the arrest at Buddy's facility of some 160 individuals supporting the strike, including several of the Union's counsel. Substantial litigation and attendant bail expenses were borne by the Union.<sup>3</sup>

Buddy manufactures sporting goods which are sold under various brand names. Buddy has no retail facilities of its own and sells its products only at wholesale. Respondent sells Buddy's products at its store although they represent but a very small portion of its product inventory and the sales of these products constitute a very small portion of the store's total revenue.

The store is a large single structure on its own city block. The entire block is Respondent's leasehold property. It is located in an area known as the Bergfeld Shopping Center. The structure has several public entrances and is essentially surrounded by a parking lot and public sidewalks. Extra parking is provided across the street. No other enterprises are located on the block. Other retail stores, including a cafeteria and a grocery store, are located on separate city blocks in the area.

Tyler, Texas, is a city of some 70,000 persons located in Smith County with a greater area population of perhaps 100,000. It is a center of business and commerce in

east Texas. Tyler has various mass media, including two newspapers and local radio and television programming.

The Union does not represent and has not sought to represent employees of Respondent at its store. Insofar as the record reflects, the store's employees have not been and are not now represented by a labor organization.

#### 2. The Union's handbilling campaign

In June, the Union determined to augment its strike against Buddy by distributing handbills at certain area retail stores that carried Buddy products. Respondent's store was one of the facilities selected. The Union prepared handbills for distribution at these stores.<sup>4</sup>

On June 9, as part of the Union's handbilling campaign, four union members who were also striking employees of Buddy stationed themselves in pairs outside the two main public entrances to the store soon after the store opened for business. As customers approached the store entrances the union agents proffered handbills and asked that customers read the literature and support the Union. After an hour and some 20 minutes as the handbillers were preparing to take a lunch break, Respondent's security guard, C. B. Douglas, told the handbillers that there was a company policy that prohibited handbilling on store property.<sup>5</sup> He suggested they handbill from the curb, driveway entrances, or anywhere else not on store property. He asked them to leave and the handbillers left. The conversation concluded without harsh or threatening words.

After a lunch break the handbillers returned to the facility and attempted to handbill from the curb sidewalk and drive areas along the streets and the outside perimeter of the parking areas; i.e., off Respondent's leasehold. The handbilling was unsatisfactory. Few, if any, pedestrians were encountered because customers drove into Respondent's parking lot, parked, and then entered the store. These customers did not walk to the perimeter of the lot to receive a handbill. Customers in automobiles entering the lot rarely stopped at the street or driveway

<sup>4</sup> The handbills stated:

#### FOR YOUR INFORMATION

Dear Friends:

The Employees of BUDDY SCHOELLKOPF PRODUCTS COMPANY is [sic] on Strike in Tyler, Texas. Please do not buy their Products sold at this Store. Employees of Buddy Schoellkopf have been on strike since February 8, 1979, trying to obtain fair Wages, Working Conditions and Benefits.

Following are items produced at the Tyler Plant:

- Life Vest
- Boat Cushions
- Ski Belts
- B. V. Jackets and Vest
- Hunting Jackets

These items are produced under Brand Names of RED HEAD, BLACK SHEEP and BUDDY SCHOELLKOPF.

Thank you  
Local 746, URW  
Tyler, Texas

<sup>5</sup> The store manager, C. R. West, had learned of the pamphlets, procured one, and reported the ongoing events to Respondent's legal division. The manager then initiated the ejection of the handbillers through its admitted agent Douglas.

<sup>2</sup> Unless hereinafter indicated all dates refer to 1979.

<sup>3</sup> The Union sought and Respondent opposed my taking judicial notice of the April 14, 1979, decision of the U.S. District Court for the Eastern District of Texas in *Nash, et al. v. Chandler, et al.*, 101 LRRM 2342, dealing with the strike at Buddy. I have taken notice of this decision only to the extent of its factual recitation of arrests during the strike and related background events. The court's factual findings regarding such matters of public record are inherently trustworthy and are properly noticed even though the court's decision may be on appeal and even though Respondent was not a party. I have not taken notice of nor considered any statements or findings of fault with respect to the conduct of any of the participants.

entrances to receive a handbill. When such an event occurred it created an unreasonable traffic safety hazard as a result of traffic backing up into the street. After a period of about 30 minutes the handbillers abandoned their efforts.

On or about June 13, the Union sent the following letter on the Union's letterhead dated June 12 to Respondent's store manager:

Dear Mr. West:

On Saturday, June 9, 1979, members of URW Local 746 located in Tyler, Texas, who are on strike at the Buddy Schoellkopf Plant in Tyler appeared at your store for the purpose of passing out handbills. These handbills are asking customers not to purchase products made at the Buddy Schoellkopf plant in Tyler, Texas. They do not seek to stop the customers from entering your store nor to stop employees from working or selling any merchandise.

I am informed that you refused to allow the distribution of these handbills. We will again attempt to pass out handbills and ask for your cooperation. This is our only effective means of communicating to the public our labor dispute with the Buddy Schoellkopf Company.

I will appreciate your cooperation.

Yours truly,  
John Nash, President  
Local 746, URW

Respondent did not respond to this letter.

Again on June 16 the Union attempted to handbill at the store under virtually identical circumstances and with the identical results as on June 9. Handbilling commenced during business hours at the two main entrances to the store. The handbillers were soon asked to leave Respondent's property by a security guard and they did so. Subsequent attempts to handbill on the property perimeter were unsuccessful as before. Again to the limited extent it was successful the handbilling created a potential traffic hazard. As before the offsite handbilling was soon discontinued. No handbilling was undertaken thereafter.

The trespassory handbilling was peaceful and nondestructive. No blockage of entrances occurred at any time nor was there evidence of customer complaints regarding the handbillers' activities or the handbills. Some customers who took handbills into the store apparently did not dispose of them properly, however. A maintenance employee had occasion to pick up some handbills which were found on the store counters and in the aisles.

### 3. Respondent's rule concerning solicitations and their history of application

Respondent maintains a general policy manual containing a personnel manual which includes section 4007, "Distribution of Literature and Solicitation on Company Time for Non-Company Activities." It states in part:

Only employees of Wards shall be permitted access to any part of the Company's property not open to

general public. Non-employee representatives may visit only those parts of the Company premises open to the general public—public cafeterias, public washrooms and sales floor. Such persons must conduct themselves in a quiet and orderly manner while on such Company premises; they may not distribute literature, make speeches, hold meetings, or disrupt the working time of any employee or the operation of any department.

Solicitations for charity drives and fund raising campaigns are to follow the guidelines for solicitation as outlined above. The Company generally supports one all-out community charity drive. Prior approval is required for any additional charity drives held on Company property. Such approval is to be made by the Retail or Catalog Store Manager, Catalog House Personal [sic] Manager, Regional Personnel Director or Corporate Personnel Director.

Store Manager West testified that the store receives frequent requests to solicit funds at the facility entrances from organizations such as the Salvation Army, Shriners, Disabled Veterans, etc., and that the store and its competitors regularly grant permission for such solicitation.<sup>6</sup> West distinguished the permitted charitable conduct from the employees' conduct herein. He noted the boycott message of the handbill "diverts from the charitable organization purpose" and thus comes "under [Respondent's] general policy prohibiting passing out of written literature, material."

### C. Analysis and Conclusions

#### 1. Test to be applied

This case requires a balancing of conflicting statutory and property rights. Few additional factual or legal questions exist. The conduct alleged as a violation of the Act is not disputed. Respondent demanded that employees discontinue handbilling and leave its premises. If the employees, under all the circumstances, were entitled to be on Respondent's premises, then Respondent in demanding they leave violated Section 8(a)(1) of the Act. *Giant Food Markets, Inc.*, 241 NLRB 727 (1979). If employees were not properly on the premises then Respondent's conduct was permissible under the Act.

The Union,<sup>7</sup> in handbilling Respondent in the manner described, without consideration of the location of the conduct, was engaging in activity permitted under the Act. *N.L.R.B. v. Fruit & Vegetable Packers & Warehousemen, Local 760, et al. [Tree Fruits, Inc.]*, 377 U.S. 58 (1964), and *N.L.R.B. v. Servette, Inc.*, 377 U.S. 46 (1964). The activity of boycotting a product in this manner is sometimes referred to as *Tree Fruits* conduct or picket-

<sup>6</sup> Union President John Nash also testified to observing charitable solicitation and distribution of literature to customers at the store entrances. West conceded that the Shriner solicitors distributed pamphlets or newspapers which became litter in the store and had to be picked up.

<sup>7</sup> Sec. 7 rights accrue to employees, but labor organizations' activities are regulated under the provisions of Sec. 8(b) of the Act. Here the activity was conducted both by employees and the Union and, in this context, the terms are used interchangeably.

ing. While no employees of Respondent were involved in the handbilling, employees of Buddy were and the Act construes the term "employee" in such situations to include "members of the working class generally." *Giant Food Markets, Inc.*, *supra* at fn. 5, and cases cited therein. Employees were acting concertedly about a matter concerning their terms and conditions of employment and were not engaging in conduct otherwise illegal under the Act. Thus, the conduct herein, without reference to the critical question of the location of the conduct, was clearly protected concerted activity sheltered by Section 7 of the Act.

The analysis then takes as its starting point the proposition that, but for the fact that the employees selected land leased by Respondent,<sup>8</sup> the conduct was concerted and was protected by the Act. The conduct occurred, however, on Respondent's property. Respondent asserted its property right in demanding that union agents leave Respondent's store. One property right is the right of exclusion. Thus, it seems clear that property rights and statutory rights are in conflict in this case. The Supreme Court has instructed the Board to accommodate Section 7 rights and property rights "with as little destruction of one as is consistent with the maintenance of the other."<sup>9</sup> The Court in *Hudgens* gave further instruction:

The locus of that accommodation, however, may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context. In each generic situation, the primary responsibility for making this accommodation must rest with the Board in the first instance. [424 U.S. at 522.]

It is appropriate then to analyze first the nature and strength of the statutory rights asserted by the employees and second the nature and strength of the property rights asserted by Respondent herein.<sup>10</sup>

## 2. The Section 7 rights in the instant case

Section 7 gives employees, *inter alia*, the right to act in concert for mutual aid and protection. Such activities are varied and arise in almost endless permutations.<sup>11</sup> Board

<sup>8</sup> I find for purposes of this case that it makes no difference whether Respondent's interest in the land was leasehold or fee simple.

<sup>9</sup> *Hudgens v. N.L.R.B.*, 424 U.S. 507, 521 (1976), citing *N.L.R.B. v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1965).

<sup>10</sup> The Court established such a balance in *N.L.R.B. v. Babcock & Wilcox Co.*, *supra*, where union organizational access was involved. The Court stated:

[A]n employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution. [351 U.S. at 112.]

In the instant case, the availability of alternative means of communication to the Union is examined as part of the "nature and strength" of the employees' statutory rights, and the rules of Respondent concerning handbills are analyzed as part of the treatment of the "nature and strength" of Respondent's property rights.

<sup>11</sup> Since certain conduct illegal under the provisions of Sec. 8(b) of the Act can render employee activities unprotected, virtually the entire statu-

and court cases discussing conduct which is protected by Section 7, but which, because it occurs in a trespassory context, must be balanced against property rights, have not covered as wide a range of activities. They have largely been limited to cases involving organizational rights, such as the right of employees and nonemployees to enter an employer's property to talk to employees about unions, and to picketing and/or handbilling activity where employees seek to bring economic pressure to bear in an organizational or economic dispute.

The courts and the Board have dealt frequently with organizational solicitation where the union's intended audience is the employer's employees,<sup>12</sup> and with economic picketing where the employee conduct is directed against the struck employer's operations.<sup>13</sup>

A separate type of employee activity may be called consumer-directed activity because it is directed not at the employees of the employer or the employees of those who pick up or deliver at its site, but rather exclusively to the customers of the employer.<sup>14</sup> Consumer-directed conduct is also of two separate and distinct types: area standards and product boycott. Area standards picketing is directed at customers of an employer and urges that customers not patronize the employer in any way. Thus, the conduct attempts to induce a complete cessation of that employer's sales. The basis of the dispute with the employer in an area standards campaign is the assertion that the employer is paying its employees less than the standard in the area, thereby undermining the benefits of employees at other employers. Product boycott conduct is directed at customers of an employer but urges certain products made by a separate employer with whom the employees have a dispute. Thus, the dispute with the employer who is suffering the handbilling is limited in product boycott or *Tree Fruits* situations to the extent that that employer is carrying products of another employer. So, too, the goal of the conduct is limited to inducing customers not to purchase the product(s) made by the other employer.

The nature and strength of various Section 7 activities presumably varies with the necessity of the conduct, its relation to intended purpose, the Act's interpretation and legislative history, and many other factors such as danger of enmeshing others in the dispute. The Board is called upon to make such an initial analysis. While I have not discovered and the parties have not cited to me a case involving balancing product boycott or *Tree Fruits* conduct, the Board has made such an analysis of area standards conduct in *Giant Food Markets, Inc.*, *supra*. Because consumer-directed conduct differs from other types of Section 7 activity, it is useful to consider

tory scheme of Sec. 8 of the Act has been analyzed and applied in case-by-case determinations of Sec. 7 rights.

<sup>12</sup> See, for example, *N.L.R.B. v. Babcock & Wilcox Co.*, *supra*, and *Central Hardware Co. v. N.L.R.B.*, 407 U.S. 539 (1972).

<sup>13</sup> See, for example, *Hudgens v. N.L.R.B.*, *supra*, decision on remand 230 NLRB 414 (1977); *Frank Visceglia and Vincent Visceglia, t/a Peddie Buildings*, 203 NLRB 265 (1973), enforcement denied 498 F.2d 43 (3d Cir. 1974); *Seattle-First National Bank*, 243 NLRB 898 (1979).

<sup>14</sup> The conduct must be limited to consumers for, if employees are induced to cease work, the conduct may be found to be illegal under the Act. See Sec. 8(b)(4) and (7) of the Act.

the Board's analysis of area standards picketing before weighing the nature and strength of product boycott handbilling as a Section 7 rights.

In *Giant Foods*, the Board balanced an employer's property rights against the Section 7 rights involved in area standards picketing and struck the balance in favor of Section 7 rights. The Board noted (241 NLRB at 728):

Area standards picketing is engaged in by a union to protect the employment standards it has successfully negotiated in a particular geographic area from the unfair competitive advantage that would be enjoyed by an employer whose labor cost package was less than those of employers subjected to the area contract standards. Failure to protect these standards could result in an undermining of wage and benefit gains in such areas. Therefore, in its attempt to protect the area standards, a union acts not only in its own interest, but also in the interest of employees of employers with whom it has negotiated more beneficial employment standards. It is this legitimate nature of the union's actions which we believe makes properly conducted area standards picketing not only lawful, but affirmatively protected under Section 7 of the Act. Employees have a right to protect advancements they have made, and their union as their representative has a right to protect their interests.

The Board thus finds area standards picketing to be an attempt to protect advances made with other employers. The product boycott activity of the instant case may be characterized as an attempt by the employees not to protect but rather to achieve an advance in employment standards with another employer. The Union here handbilled Respondent as part of its campaign to improve the working conditions of Buddy employees. Thus, consumer boycott handbilling and area standards picketing, like primary economic picketing, are grounded on the attempt by a union to achieve increase and/or to resist reductions in the working conditions of the employees it represents.

A product boycott is therefore, like area standards and primary picketing, motivated by a desire to improve or sustain the lot of represented employees. It differs from single site primary picketing in two ways, however. First, a separate location is involved and, second, a different employer is involved. Where a location separate from the site of the primary dispute is selected as the location of Section 7 activity but the employer is the same, the Board and the courts have had little trouble regarding the Section 7 activity as strong and direct. For example, in *Hudgens*, *supra*, the Section 7 activity of warehouse employees in picketing at a separately located retail outlet of their employer was held to prevail over property rights.

The Act prohibits most union picketing and handbilling activity directed against an employer other than the employer with whom the union has its dispute. This is especially true where the employers are also in different locations. Consumer-directed conduct, i.e., area standards picketing and product boycott activity, is, however, per-

mitted activity which may be directed at an employer other than one with which the union has an organizational or economic dispute. Thus, the union is not limited to the employer whose employees it represents. Indeed, such activity may occur away from the jobsite of such represented employees. The Board is aware that such seemingly remote conduct may be perceived as a lesser type of Section 7 activity.<sup>15</sup> In *Giant Foods*, *supra* at 728, the Board noted:

In the instant case, it may be argued that area standards picketing is not for the benefit of the Employer's employees, but rather for the benefit and protection of complete strangers to this employment relationship. Therefore, such picketing should not be allowed on the Employer's premises. However, as we noted earlier, area standards picketing is a protected Section 7 right and is for the protection of "employees" represented by the union. The fact that the employees whom the picketing is primarily meant to benefit are not those of picketed employer is not as important in our view as is that fact that the employer being picketed is the employer with whom the union has the dispute. It is this employer which the Union charges is undermining the livelihood of the represented employees in the area. It logically follows that the location of the employer's business is where the Union can reasonably expect its picketing and handbilling to have the most impact.

Product boycott activity differs from area standards picketing under what I will characterize as the Board's "identity of the disputant" test set forth in *Giant Foods*. In area standards picketing the activity is directed at the employer whose conduct is undermining the benefits of the employees the union represents. The employer of the union-represented employees has no dispute with the Union and can take no action which will end the dispute. Thus, no conduct is directed at it. In a product boycott case, as here, the employer against whom the conduct is directed is not the prime disputant from the Union's perspective. The union's conduct in a product boycott is intended to impact not so much on the employer being handbilled as on the manufacturer of the product—herein Buddy—the employer with whom the union has its economic dispute.<sup>16</sup> Thus, product boycott handbilling seems to have a secondary aspect which, it may be argued, should render it of lesser weight or strength than other types of Section 7 conduct. For the reasons herein-after stated I do not believe this is the case.

<sup>15</sup> See, for example, the suggestion that area standards picketing may be entitled to less protection than organizational solicitation in the Supreme Court's plurality opinion in *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978), and the Board's respectful disagreement in *Giant Foods*, *supra* at fn. 11.

<sup>16</sup> Following the "struck" product to the retailer who offers it to the consumer is necessary if the Union is to appeal to the public for aid in a dispute with an employer who, like Buddy here, does not sell its products at retail but limits its sales to others, such as Respondent, for resale. In many such cases a primary picket line may be ineffective. In the instant case, the picketing at Buddy met substantial resistance; see discussion, *supra*.

Congress in drafting the Act and the Board and courts in interpreting and applying it have recognized that, while innocent parties should properly be protected from labor disputes not of their making, a close identification or alliance between employers may justify treating the employers as a unit for purposes of considering the propriety of the conduct directed against them. The concept of the secondary or neutral as an innocent who should be sheltered from conduct directed against it thus requires scrutiny of the relationship between the employers.

An employer who offers for sale the products of another—as Respondent here sells the products of Buddy—is not regarded an ally or twin of the primary employer when evaluating the propriety of economic action against the selling employer by a union. Yet, product boycotts or *Tree Fruits* picketing has been a traditional device by which a union “follows the goods” and has been historically justified by pointing out the “unity of interest” between the employers involved.<sup>17</sup> The Supreme Court has reviewed this historical distinction:

The distinction between picketing a secondary employer merely to “follow the struck goods,” and picketing designed to result in a generalized loss of patronage, was well established in the state cases by 1940. The distinction was sometimes justified on the ground that the secondary employer, who was presumed to receive a competitive benefit from the primary employer’s nonunion, and hence lower, wage scales, was in “unity of interest” with the primary employer, *Goldfinger v. Feintuch*, 276 N.Y. 281, 286, 11 N.E. 2d 910, 913; *Newark Ladder & Bracket Sales Co. v. Furniture Workers Local 66*, 125 N.J. Eq. 99, 4 A. 2d 49; *Johnson v. Milk Drivers & Dairy Employees Union, Local 854*, 195 So. 791 (Ct. App. La.), and sometimes on the ground that picketing restricted to the primary employer’s product is “a primary boycott against the merchandise.” *Chiate v. United Cannery Agricultural Packing & Allied Workers of America*, 2 CCH Lab. Cas. 125, 126 (Cal. Super. Ct.). See 1 Teller, *Labor Disputes and Collective Bargaining* § 123 (1940). [*N.L.R.B. v. Fruit & Vegetable Packers, Local 760* [*Tree Fruits*], 377 U.S. at 64, fn. 7.]

A union’s right to appeal to consumers of the struck product, even though the conduct occurred at the site of a separate employer who offered the goods for sale, has been preserved in the proviso language of Section 8(b)(4) of the Act. This right to follow the product was regarded by Congress as a significant right. The Supreme Court has noted:

The proviso was the outgrowth of a profound Senate concern that the unions’ freedom to appeal to the public for support of their case be adequately

safeguarded. [*N.L.R.B. v. Servette, Inc.*, 377 U.S. at 55.]

It is clear that the consumer boycott handbilling here is not directed at the primary disputant, Buddy. While Respondent has a “unity of interest” with Buddy, it is not in a traditional sense an ally of Buddy. The Union in support of its dispute with Buddy could not under the Act seek to induce Respondent’s consumers to forgo their patronage entirely. It cannot engage in a general consumer boycott as is permitted in an area standards dispute. Indeed, were the products of Buddy to constitute a sufficiently large proportion of Respondent’s sales, the handbilling undertaken would as a result significantly injure Respondent and therefore violate Section 8(b)(4) of the Act. *N.L.R.B. v. Retail Store Employees Union, Local 1001, Retail Clerks International Assn., AFL-CIO* [*Safeco Title Insurance Co.*], 447 U.S. 607 (1980). The Act therefore limits the injury that Respondent may suffer.

I have considered the above factors and, for the reasons hereinafter set forth, I find that consumer-directed product boycott picketing and area standards picketing are Section 7 rights of equal nature and strength. I further find that consumer-directed product boycott picketing, organizational activity, and primary economic activity are also Section 7 rights of equal nature and strength.

First, it is clear that the consumer product boycott activity herein is conduct designed and intended to improve employees’ terms and conditions of employment. Second, while it is true that the conduct in question is not directed against the primary disputant, Buddy, or at its location, Respondent has a “unity of interest” with Buddy and it is that product nexus which is the focus of the employee activity. This is a historically sanctioned traditional activity. Third, the activity in question has a limited audience and a limited intended result. Accordingly, injury to Respondent resulting therefrom is, at its worst, quite limited in extent and is again related to Respondent’s commercial relationship to Buddy. Fourth, the conduct is necessary<sup>18</sup> to gain the support of the public in a primary dispute with an employer who offers its product to the public only through intermediaries.

Thus, the activity is engaged in for the purpose of improving employee working conditions. It is directed at a party with a “unity of interest” with the disputant and the conduct is limited in nature, matching exactly the extent of that unity of interest. Finally, the conduct is traditional, historically sanctioned, and necessary if the employees are to exercise their important right to bring their dispute to the attention of the public. For these reasons I believe consumer-directed product boycott handbilling should be regarded, along with other forms of economic and organizational activity, as being Section 7 activity of the highest “nature and strength.”

There is a second, independent basis for finding the conduct herein to be “full strength” Section 7 activity. This second means of analysis starts with premise that

<sup>17</sup> The Supreme Court’s plurality opinion in *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, *supra* at fn. 42, considered the relatively recent recognition of area standards picketing as a Sec. 7 right as a factor tending to make such picketing a less compelling right when balanced against an employer’s property rights.

<sup>18</sup> This analysis does not address the issue of alternative means of engaging in a consumer product boycott, which is discussed, *infra*. Here the issue is whether or not a consumer product boycott is necessary at all to support the Union’s efforts against Buddy.

Congress, in creating and amending those sections of the Act regulating what is commonly known as union recognition and secondary conduct, has already undertaken the balancing process invited by the Court. Thus, with respect to these regulated areas, Congress has spoken by limiting and in some cases prohibiting certain conduct. That conduct allowed by Congress in these areas has already been carefully regulated, and it should not therefore be weighed a second time, in effect twice discounting certain conduct permitted by Congress in a limited form.

Historically, the strike and the boycott have been labor's key weapons in its economic disputes with employers. Regulation—judicial and legislative—has been a matter of historical contention. Intense political debate and compromise are reflected in the language of statutes which regulate such conduct. These considerations bore upon Congress in drafting and amending Section 8(b)(4) and (7) of the Act and upon the decisions of the Board and courts in interpreting and applying its provisions. Courts and legal scholars have commented frequently on the complexity and difficulty of interpretation of the language of these sections of the Act. For better or worse the development and application of these provisions of the Act have regulated the type, place, purpose, and audience of picketing, solicitation of support, and other forms of publicizing trade union disputes. Complex and difficult as these sections are, they comprise a regulatory scheme governing the conduct of industrial disputes which is the envy of other nations.

Congress through these provisions of the Act has limited the types of solicitation which may be undertaken by a labor organization under given circumstances. For example, at the site of a primary dispute, a union may urge employees of the employer to cease work, it may urge that deliveries and pickups be halted, and it may ask purchasers and suppliers to abandon all trade with the employer. An area standards picket, however, must be directed only to customers—not employees. A product boycott must be limited to the specific product of a specific employer and must be directed only to potential consumers of that product. Congress has thus considered and weighed the economic and organizational activities labor organizations utilize and, to the extent it thought a given type of activity to be of lesser value, restricted its scope and potential effect.

In my view, by regulating organizational and economic activity such as picketing and handbilling under Section 8(b)(4) and (7), Congress has balanced conflicting interests and has allowed only certain conduct. This conduct has met the tests of the legislative process. In short, Congress has already undertaken a balance of Section 7 rights and property rights of the type the court has applied in other areas. Thus, I would find that all organizational and economic conduct permitted under Section 8(b)(4) and (7) is Section 7 activity of equal nature and strength because such permissible conduct has Congress' measured approval. In a particular case, then, I would proceed to consider the separate factual issues, such as the existence of alternatives to the questioned conduct, and to undertake the ultimate balancing of the employees' Section 7 rights against the employer's property

rights. This is not to say that other forms of Section 7 activity—where the detailed guidance of Congress in its legislative history is not present—need not be weighed and balanced. I limit my view to Section 8(b)(4) and (7) of the Act, where Congress examined the conflicting rights involved in various types of picketing and enacted the elaborate regulating scheme contained in those provisions.

This approach may be applied to the instant case. Here the Union through employees of Buddy engaged in activity strictly limited in its scope and potential impact. The conduct was so limited in order not to run afoul of the provisions of Section 8(b)(4) of the Act. Consistent with the provisions of the Act, the Union made a public appeal at the store directed only at Respondent's customers and seeking only that they not purchase Buddy's products while shopping at Respondent's store. A broader audience, a broader solicitation, or a broader effect would have caused the Union's actions to violate the Act. The Union made its strictly limited appeal because Congress had determined, in drafting the language of Section 8(b)(4) of the Act, not to allow the Union to do more. The Union's selection of an arguably less proper location than Buddy's facility and an arguably less proper employer as the subject of economic activity as part of a campaign to aid it in its dispute with Buddy is paid for by the Union's highly circumscribed right to the audience it may solicit and the conduct it asks its audience to engage in.

Congress has thus carefully regulated the various forms of economic and organizational activity available to employees. The almost stylized conduct of the employees herein is an example of such highly regulated conduct. The Board should acknowledge this process and treat the congressionally sanctioned conduct of employees in these areas as of equal weight. Area standards picketing, product boycotts, permissible organizational and primary economic conduct if valid under Section 8(b)(4) and (7) should all be regarded as generic equivalents with congressional approval<sup>19</sup> and all should be found to be Section 7 activities of equal weight.

Even if the Board determines it is always appropriate to make a case-by-case weighing of each type of economic and organizational activity permitted under Section 8(b)(4) and (7) of the Act, consideration must be given to the fact that various types of conduct are different in their intended or potential effect. Thus, the potential or desired harm to the employer at whose situs the conduct occurs is greatest in primary economic picketing, less in area standards picketing, and least in consumer product boycott. In an economic strike a union may seek to halt the employer's operation entirely, denying it employees, supplies, the opportunity to make deliveries, and the patronage of its customers. In area standards conduct the audience must be limited to customers but the union may induce them to stop all patronage. In a product boycott the audience must also be limited to customers and the solicitation of customers must be further

<sup>19</sup> Again, this analysis is applied only to those modes considered and regulated in the formulation of Sec. 8(b)(4) and (7). Clearly not all conduct permitted by the Act is of equal value.

limited, seeking a boycott only of the products of the struck employer. The scope of the audience and the degree of support asked of that audience are important factors for the Board to consider in weighing the Section 7 rights of employees under varying circumstances. The less injury the Union seeks to impose on the employer against whom the activity is directed, the greater weight or value should be accorded that conduct when weighing the various factors which make up the relative nature and strength of a given Section 7 activity.

### 3. The existence of reasonable substitutes for the employee conduct herein

Given that the product boycott handbilling undertaken against Respondent herein is an important Section 7 right, a separate question exists. Must the employees' Section 7 activity herein have taken place on Respondent's property or did reasonable alternatives exist? Clearly, if an easy, effective, nontrespassory alternative to onsite handbilling exists, there is far less reason to sustain the trespass irrespective of the value or strength of the Section 7 rights involved. Among the nontrespassory alternatives discussed in the cases and/or suggested by Respondent and opposed by the General Counsel on brief are (a) the use of media and other mass communication techniques to convey the intended message to Respondent's customers and (b) removing the handbilling activity to public property on the street and sidewalk areas of Respondent's store property. The two proposed substitutes will be discussed separately.

#### (a) Alternatives other than handbilling<sup>20</sup>

The Board and the courts have looked for alternative means of communication in cases involving a union's right to enter an employer's premises for purposes of organizing employees. Since in those cases there is a limited identifiable class of individuals to be contacted, it is possible a union may reasonably contact that class by advertising, telephone, street contacts, etc. Respondent here suggests the Union could use print and electronic media, billboard advertising, and other means to convey its product boycott message to Respondent's customers and thus obviate its claimed need to trespass on Respondent's property.

In consumer-directed messages, however, the intended class of potential shoppers is far larger than the class of employees involved in an organizational situation. Further, when the audience is composed of consumers as in the instant case, the members of the class are not susceptible to identification until they reveal themselves as shoppers who intend to enter Respondent's facility. Thus, the inchoate class is the entire area population until particular members reveal themselves by coming to the store. The Board found in *Scott Hudgens supra*, 230 NLRB 414 (1977), that the advertising techniques used by merchants were not a reasonable alternative means for employees to communicate with their intended audi-

<sup>20</sup> Primary picketing at Buddy is not an alternative under this analysis. The right in question is the right to engage in a product boycott directed against Respondent. The issue here is if alternative product boycott techniques were available.

ence concerning an economic strike.<sup>21</sup> Even in an organizational access case the Board found mass media an unreasonable means of communication with the intended audience of employees. *Hutzler Brothers Company*, 241 NLRB 914 (1979), enforcement denied on other grounds 630 F.2d 1012 (4th Cir. 1980).

Guided by all of the above, I find there was no reasonable substitute for the employees' efforts to induce a consumer product boycott of Buddy products at Respondent's store.

#### (b) Handbilling offsite at the property perimeter

The alternative methods of communication discussed above were rejected based on an abstract analysis that if attempted they would not be effective. The effectiveness of handbilling at the property perimeter was tested directly by the handbillers themselves on two occasions following their expulsion from Respondent's property. No abstract determination is necessary. Perimeter handbilling was tried and failed.<sup>22</sup>

First, the record convincingly demonstrates and I find that Respondent's customers drove rather than walked onto Respondent's property. Thus, no pedestrian traffic existed at the property perimeter to solicit or handbill. Second, customers, once having entered the property and parked in the lot, proceeded directly into the store. They did not walk from their parking places away from the store to the perimeter of the property. Thus, customers were unavailable for perimeter handbilling except as they entered or left the property at the driveway entrances. Third, attempts to handbill drivers in their automobiles as they entered or left the property were largely unsuccessful. Customers did not often stop and roll down their window to converse and receive a handbill. To the degree success was achieved, the autos that stopped created a traffic hazard. Traffic backed up into the street behind those autos whose drivers stopped their cars in the driveway to roll down the windows, receive a handbill, and converse with the union members. This was one reason the employees abandoned the perimeter handbilling. The Board has noted that such hazards render picketing ineffective. *Scott Hudgens, supra* at 417.

In summary, for the reasons noted above, I find that employees seeking to communicate with potential purchasers of Buddy products among Respondent's customers had no effective or reasonable alternative to handbilling on Respondent's property at the places and under circumstances similar to those undertaken by the employees herein.

<sup>21</sup> I also find a relevant factor herein the fact that the Union was completely unable to pay for alternative commercial advertising. But see union "poverty" rejected as a relevant factor in arbitral deferral in *Croatian Fraternal Union of America*, 232 NLRB 1010 (1977).

<sup>22</sup> The use of the terms "success" or "failure" here means the success or failure of the attempts to communicate the solicitation, not the solicitation's effect. Thus, if employees were able to communicate with customers they succeeded. Whether the customers joined, opposed, or ignored the product boycott is immaterial. The employees' Sec. 7 right is in the asking, not the convincing. At the store entrances the employees had an audience, at the perimeter they did not.

#### 4. The strength and nature of Respondent's property right

An employer may put its property to a variety of uses and as a result create a variety of type of business invitees associated with the selected use. So, too, it may establish and enforce rules respecting use and access. An employer's claim to exclude certain classes of persons from its property is properly considered with these facts in mind. The Board and the courts have considered a wide variety of uses. The gamut ranges from the company town<sup>23</sup> where all aspects of commercial and residential activity necessarily occur, to the single employer whose parking lot is used by employees<sup>24</sup> or by customers.<sup>25</sup> Owners of multiemployer shopping centers,<sup>26</sup> large commercial buildings,<sup>27</sup> and industrial parks<sup>28</sup> have broader classes of business invitees because the varied operations of numerous enterprises are involved. In each case the practice of the employer in restricting or allowing the use of its property must be considered in judging the weight to be affixed to the employer's asserted right to exclude the particular Section 7 activities from its property.

Respondent offers merchandise for sale in its store to members of the public generally. During Respondent's business hours, it holds its parking lots, walkways, and store entrance areas, as well as public areas of the store, open to potential customers. Presumably, this is virtually unlimited license to members of the public to enter, examine, and purchase merchandise. Inasmuch as Respondent's facility is the only one on its property, no other employers, their employees, or customers are invited onto these public areas of the premises save as customers of Respondent.<sup>29</sup>

The testimony of Respondent's store manager, which I credit, was that Respondent allows—as does its competitors—charitable solicitation to occur on its property immediately outside its store entrances. I find that—without apparent exception—Respondent has allowed charitable solicitation to occur which was identical in time, place, and manner to the employee conduct in issue here, differing only in the message and goal of the solicitors.<sup>30</sup> I

also find that but for the message of the handbilling employees, i.e., distribution of a handbill calling for a product boycott as opposed to, for example, a Shriner's handbill soliciting charitable contributions, their activities would have been permitted at the time, in the location, and in the manner in which they were undertaken, notwithstanding Respondent's rule, which is arguably to the contrary.

I therefore find that the handbilling employees would have been welcome on Respondent's property as customers. Further, I find they would have been permitted, consistent with past practice, to solicit support for their cause and to distribute handbills as they did if their cause had been charitable or at least not directed against products carried by Respondent. Thus, I find it was not the presence of the handbillers on the property nor their conduct which displeased Respondent.<sup>31</sup> It was their object, the boycott of Buddy products, which caused their ejection.

These findings, while not dispositive of the balancing process, render Respondent's assertions of its property rights to be of a lesser nature and strength than would have been the case if all solicitation had been prohibited on the property. So, too, the invitation of the public onto the premises as potential customers diminishes Respondent's rights to exclude individuals in that class. An employer who limits the use of its premises to its own employees has a more effective claim to excluding the trespassory handbilling by nonemployees than does an employer who allows nonemployees to use the areas in question.

#### 5. Balancing, summary, and conclusions

I have found the Section 7 right of the employees herein to engage in product boycott handbilling to be an important and strong right. I have also found that no reasonable or satisfactory alternatives to handbilling on the premises exist. Therefore, if the employees are to engage in other than sham, ineffective attempts to publicize a product boycott directed at Respondent's store customers, they must be granted access to Respondent's premises.

I have also found that Respondent holds its premises open to the public generally. More particularly it allows solicitation—in some cases including handbilling—at its store entrances. I have found Respondent's only reason for excluding the employees involved herein from the premises was the object of their solicitation—the boycott of Buddy products by customers shopping in Respondent's store.

The balancing of the conflicting statutory and property interests herein must be struck in favor of the employees' Section 7 rights. This diminishing of the property rights of Respondent is not undertaken lightly. Here, however, the employees' Section 7 rights are strong. Alternatives in means or place to avoid trespass do not exist. To deny the site of the statutory activity is to de-

<sup>23</sup> *N.L.R.B. v. Lake Superior Lumber Corporation*, 167 F.2d 147 (6th Cir. 1948).

<sup>24</sup> *Central Hardware Co. v. N.L.R.B.*, *supra*; *N.L.R.B. v. Babcock & Wilcox Co.*, *supra*.

<sup>25</sup> *Hutzler Brothers Company*, *supra*; *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, *supra*.

<sup>26</sup> *Hudgens v. N.L.R.B.*, *supra*; *Giant Food Markets, Inc.*, *supra*.

<sup>27</sup> *Seattle-First National Bank*, *supra*.

<sup>28</sup> *Frank Visceglia and Vincent Visceglia t/a Peddie Buildings*, *supra*.

<sup>29</sup> The conduct in issue occurred during business hours at the main public entrances to the store. Deliveries of freight or nonpublic entrances were not involved. The time of the conduct makes it unlikely that Respondent's employees, as opposed to customers, would have been exposed to the handbilling.

<sup>30</sup> Respondent's rule concerning solicitation to the extent it addresses the conduct of its own employees in the store is irrelevant. *Seattle-First National Bank*, *supra* at fn. 4. The rule as it applies to nonemployees is ambiguous in its application to areas outside the store. To the extent the rule purports to prohibit distribution of "literature" on the property, it applies equally on its face to charitable and noncharitable solicitation and is thus honored more in the breach rather than the observance. I look to Respondent's practice, not its unenforced rule.

<sup>31</sup> I specifically reject any argument that prevention of in-store littering was a part of Respondent's motive in excluding the handbillers. Other solicitations had occasioned similar minor waste disposal problems within the store but were allowed to continue.

stroy any real chance of success and render continued activity essentially meaningless.

If the limitation of the Section 7 rights of employees in this case would require their destruction, such is not the case with Respondent's property rights. To require Respondent to allow the conduct is not to request it to breach a uniform policy of exclusion. Respondent maintains an open invitation to members of the public to enter its property during business hours. It has allowed, and continues to allow without apparent exception, conduct indistinguishable—save only for the object of that conduct—from that it prohibited herein. Thus, the intrusion required is but a single addition to a practice of making multiple exception. In this sense the reduction of Respondent's property rights necessary to accommodate the employees' Section 7 rights herein is slight and is necessary to allow the preservation of significant statutory rights of employees.

Accordingly, based upon all of the above, and the record as a whole, I find that the employees were entitled to trespass on Respondent's property under the circumstances described above. Respondent's demand that the employees leave the premises was therefore unwarranted and improper. Respondent in so demanding employees abandon their Section 7 activities has violated Section 8(a)(1) of the Act.

#### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICE UPON COMMERCE

The activities of Respondent set forth above, occurring in connection with its operations described above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By demanding that employees leave its Tyler, Texas, store premises while they were engaging in activity protected under Section 7 of the Act, Respondent violated Section 8(a)(1) of the Act.
4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found that Respondent violated Section 8(a)(1) of the Act, I shall order that it cease and desist therefrom and take certain affirmative action which will effectuate the policies of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record herein, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

#### ORDER<sup>32</sup>

The Respondent, Montgomery Ward & Company, Inc., Tyler, Texas, its officers, agents, successors, and assigns, shall:

##### 1. Cease and desist from:

(a) Prohibiting representatives of the Union from distributing handbills as part of protected concerted activity by demanding that they leave Respondent's premises.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

##### 2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post at its store in Tyler, Texas, copies of the attached notice marked "Appendix."<sup>33</sup> Copies of said notice, on forms provided by the Regional Director for Region 16, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material. Respondent shall also send a copy or copies of said notice to the Union.

(b) Notify the Regional Director for Region 16, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

<sup>32</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

<sup>33</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

#### APPENDIX

##### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing before an Administrative Law Judge of the National Labor Relations Board in which all parties were accorded an opportunity to call witnesses and to introduce relevant evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post this notice.

WE WILL NOT prohibit representatives of United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO, Local 746, from distributing handbills as part of their protected concerted activity by demanding that they leave our premises.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the

exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act, as amended.

MONTGOMERY WARD & COMPANY, INC.